IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. 73

ARMOUR AND COMPANY,
Petitioner,

vs.

ADAM WANTOCK AND FRANK SMITH,
Respondents.

BRIEF ON BEHALF OF ARMOUR AND COMPANY.

CHAS. J. FAULKNER, JR.,
FREDERICK R. BAIRD,
R. F. FEAGANS,
PAUL E. BLANCHARD,
Attorneys for Petitioner.
4301 South Racine Avenue,
Chicago 9, Illinois.

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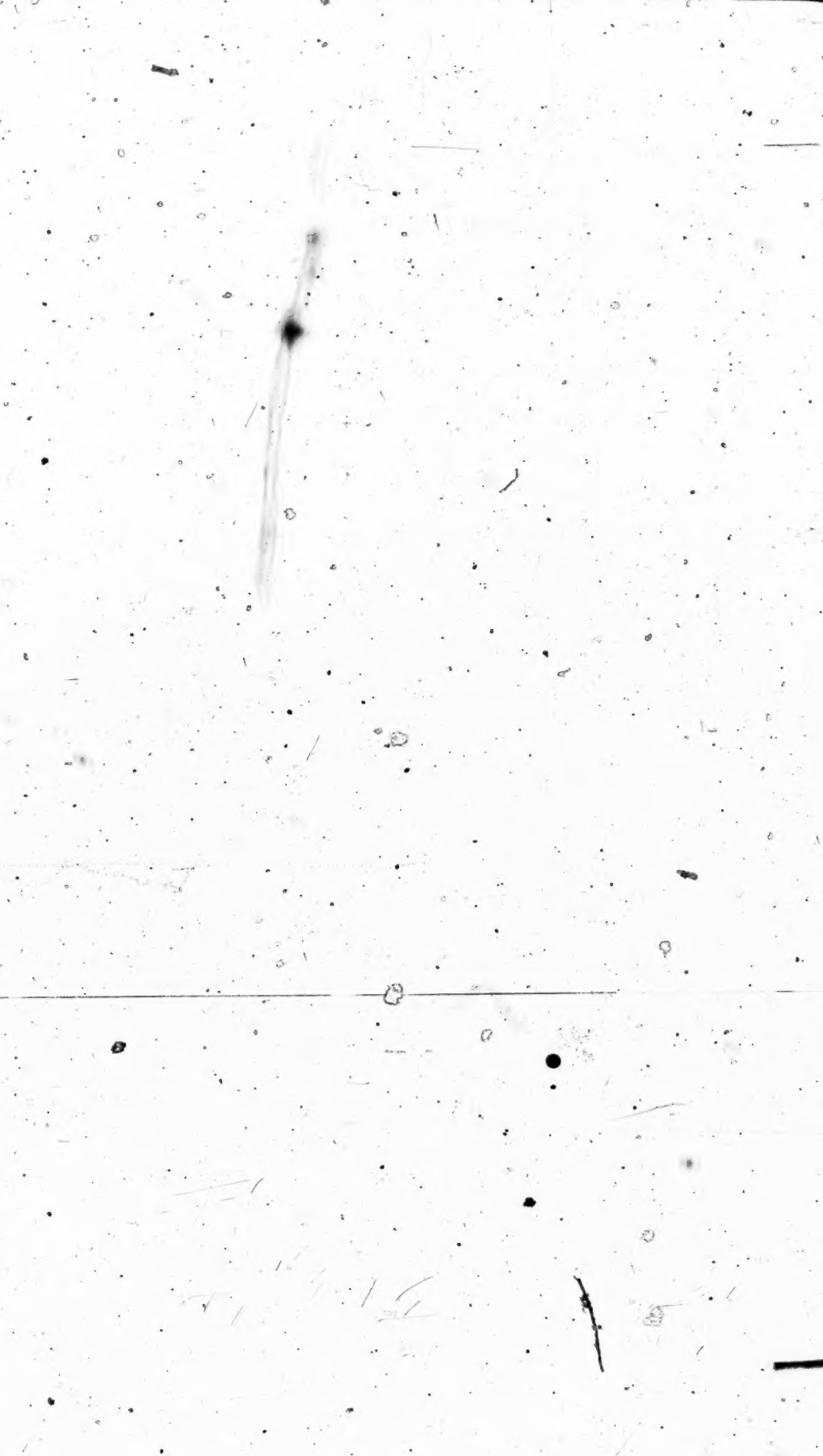
SUBJECT INDEX.

TABLE OF CASES, STATUTES AND AUTHORITIES CITED.



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Armour and Company, the Defendant-Appellant herein respectfully submits its brief in the form and manner required by the 27th of the Rules of this Court. All emphasis in quoted language are by the author.

Official Reports of the Opinions of the Courts Below.

The memorandum opinions of the United States District Court for the Northern District of Illinois, Eastern Division were filed October 2, 1942 and May 18, 1943. They are not reported in the Official Reporter System, but appear in 6 Labor Cases 61,313, and 7 Labor Cases

61,681. They also appear at pages 7 and 29 of the transcript of record herein.

On appeal therefrom, the affirming opinion (one judge dissenting) of the United States Circuit Court of Appeals for the Seventh Circuit was filed on February 5, 1944. It is reported in 140 Fed. (2d) (Adv. Op.) 356, and is set forth in full beginning at page 42 of the transcript of record herein.

Grounds on Which Jurisdiction of the Court Is Invoked.

1. The statutory provision believed to sustain the jurisdiction of this Court is Section 347 (a) of Title 28, U.S.C.A. (quoted in full in appendix A of petition for certiorari).

2. This Petition was filed in this Court within the time required by the first paragraph of Section 350, Title 28, U.S.C.A. (quoted in full in appendix A of petition for certiorari). The decision of the Circuit Court was made February 5, 1944 (R. 42-45). The Petition herein was filed May 2, 1944, less than three months after the entry of the decision.

3. This proceeding involves the interpretation and application of a statute of the United States, *viz.*, The Fair Labor Standards Act, and particularly Sections 203(j), 203(b), 203(g), 203(i), and 207(a). Title 29, U.S.C.A. (quoted in full in appendix A attached hereto.

4. The cases believed to sustain the jurisdiction of this Court are:

Opp Cotton Mills, Inc. v. *Wage and Hour Administrator*, 312 U.S. 126.

Kirschbaum v. *Walling*, 316 U.S. 517.

Warren-Bradshaw Drilling Co. v. *Hall*, 317 U.S. 88.

Overstreet v. *North Shore Corp.*, 318 U.S. 125.

Tennessee Coal, Iron & R. R. Co. v. *Muscoda Local No. 123*, ... U.S. ....; 88 L. Ed. (Adv. Op.) 610.

Statement of the Case and the Questions Presented.

Appellant maintains a soap factory at Chicago, Illinois, in which it is conceded goods are regularly produced for shipment in interstate commerce (R. 11). That plant is staffed by a full complement of production and maintenance workers, including watchmen such as were considered by this Court in *Kirschbaum* v. *Walling*, 316 U.S. 517, and in *Walton* v. *Southern Package Corporation*, ... U.S. .....; 88 L. Ed. (Adv. Op.) 220 (R. 12-13).

In addition to this staff, and to the production and maintenance units of this plant, the Company supplements the fire protective service afforded by the regular fire department of the City of Chicago, by maintaining a fire hall on the premises (R. 8). Plaintiff-Appellees were employed as fire fighters (R. 8) as a part of this supplemental fire protection program.

Plaintiff-Appellees were not permitted to handle, process, prepare, transport or in any way come in contact with any raw material supplies, or equipment used in this plant in the production of goods, nor any partially or fully manufactured goods produced in this plant, except as access to fires or fire fighting equipment might require incidental handling of such materials or goods (R. 13). At nighttime they were not

permitted access to the plant save by permission of the watchman in charge (R. 13).

The primary service performed by plaintiff-appellees consisted of inspecting, cleaning, maintaining and repairing auxiliary fire fighting apparatus, such as the fire engines, fire hose, pumps, water barrels and pails, sprinklers and extinguishers (R. 9, 12). Occasionally they extinguished fires (R. 26-29). Their service was performed in cycles of 48 hours each. A work cycle began when the Plaintiff-Appellee "punched in" on the time clock at 8 A.M. on a certain day. The following 9 hours (excepting a half-hour off for lunch) (R. 9), these men spent their time repairing fire fighting apparatus as above described (R. 9, 12). No production work of any kind was permitted (R. 13).

At 5 P.M. these men "punched out" on the time clock, and retired to the fire hall. There the Company provided cooking equipment, beds, radios, and facilities for cards, or other games or amusements (R. 8, 12). From 5 P.M. until the following 8 A.M. he could occupy his time as he desired (R. 10). The men could cook their evening meal in their quarters if they desired, or, by permission of the watchman, eat in a near-by restaurant (R. 18). They retired and slept whenever they felt it necessary (R. 17). Or they might occupy themselves listening to radio programs, reading, playing cards or other games (R. 12) or doing whatever they pleased (R. 10). At 8 A.M. the following morning,—24 hours after "punching in",—they were free to continue sleeping, if they wished (R. 12) or to leave the premises for the remainder of the 48-hour

*For the early part of the period involved, up to Dec. 2, 1939, this cycle was 96 hours, 48 hours in residence at the fire hall and 48 hours at home (R. 8). The 48-hour cycle above is described, in the interest of brevity and clarity.

work cycle, returning 24 hours later to start a new 48-hour cycle (R. 9).*

During this interval of residence in the fire hall (5 P.M. to 8 A.M.), these men were subject to call by the watchman charged with the protection of the plant, to fight fires or make temporary repairs of defective fire fighting apparatus (R. 10). One plaintiff-appellee devoted an average of 57 minutes once every 4.3 weeks; the other devoted an average of 47 minutes once every 3.36 weeks, responding to such calls. (These figures are computed from R. 28.) A record was kept of the time consumed in answering these calls (R. 18). It is agreed that time so spent was time when the men were "suffered or permitted to work" within the meaning of the Fair Labor Standards Act.

No company executive in charge of the maintenance or production goods had any voice in deciding whether this supplemental fire protection should be maintained or not (R. 20). The Company's insurance department measures the cost of so supplementing the protection of the city fire department against the savings in meeting the terms of the insurance companies, and the head of that department alone decides at what plants such supplementary service shall be maintained and at what plants not (R. 15, 16). That executive, in turn, has no voice in production of goods at any such plant (R. 20).

Similar goods are produced for commerce at another plant of appellant at North Bergen, New Jersey (R. 20); at the four plants of Lever Brothers at Hammond, Indiana; Baltimore (Md.), St. Louis (Mo.), and in Cambridge (Mass.); (R. 21); at the 14 similar

* For a short time this work cycle was 96 hours,—48 hours in residence and 48 hours away. In the interest of clarity, we refer only to the shorter 48-hour cycle which prevailed most of the period involved.

plants of Procter and Gamble (R. 23); and at the five plants of the Colgate, Palmolive-Peet Company (R. 26). No one of these other plants maintains any full time firemen such as plaintiff-appellees (R. 20 as to Armour; R. 21 as to Lever Bros.; R. 23 as to Procter and Gamble; R. 26 at to Colgate-Palmolive-Peet). Excepting two of the Procter and Gamble plants (R. 24) none of the twenty-two other plants of any of these companies maintains as much as one full time man who devotes his entire time to fire protection (R. 20, 21, 24, 26).

These facts present the following undecided questions:

1. Are these employees engaged in commerce as (the District Court found, R. 7) within the meaning of Section 207 (a) of Title 29, U.S.C.A.?

2. Are these employees engaged in the production of any goods for commerce within the meaning of Sec. 207(a) of Title 29, U.S.C.A.?

3. Are these employees' services "an essential part of" or "indispensable to" (*Kirschbaum* v. *Walling*, 316 U.S. 517 at 524, production of goods for commerce, thereby being "necessary" to such production within the meaning of Secs. 201(j) and 207(a) of the Fair Labor Standards Act?

4. If so, are they being "suffered or permitted to work" within the meaning of Section 207(a) (as defined by Section 201(g) of the Fair Labor Standards Act, during periods when they are free to read, sleep, play cards, listen to radio programs, or otherwise engage themselves as they please, merely because they have contracted to be

ready and available for work on short notice for limited periods of time?

Specification of Assigned Errors Intended To Be Urged.

1. The Court erred in holding that either of plaintiff-appellees herein were engaged in commerce, or in the production of goods for commerce within the meaning of Section 7 of the Fair Labor Standards Act of 1938 (Sec. 207, Chap. 8, Title 29, U.S.C.A.); or in any occupation necessary to such production within the meaning of Section 3(j) of said Act (Sec. 203(j), Chap. 8, Title 29, U.S.C.A.).

2. The Court erred in holding that either of plaintiff-appellees, while playing cards, listening to the radio programs or otherwise amusing themselves while off duty on defendant-appellant's premises, were "employed" or at work, within the meaning of Sections 7 and 3(g) of the Fair Labor Standards Act of 1938 (Secs. 207 and 203 (g), Chap. 8, Title 29, U.S.C.A.).

Summary of Argument.

INTRODUCTION.

The Statute Involved (see 207(a), Title 49, U.S.C.A.).

The Questions Presented.

(a) Are these employees covered by the Act?

(b) If so, are they being "suffered or permitted to work", while playing the radio, reading, writing or amusing themselves as they please?

Rules of Construction of this Statute established by this Court require strict construction of the ordinary words of the Statute.

SECTION I. Employees of the type here covered are not covered by the Act.

The Act requires some occupation which is essential to production as a condition of coverage.

These employees had no primary responsibility for protecting the plant from fire.

The services of these employees had only the most remote bearing on production of goods.

SECTION II. Persons free to play cards, games, listen to radio, or sleep on the premises, as and when they choose, are not then employed within the meaning of the Act.

The Act requires the performance of real physical or mental exertion as employment.

The Rulings of the Wage and Hour Administrator are consonant with employers' position here.

The Doctrine of De Minimus—

Demonstrated Error of the Courts below.

ARGUMENT.

Introduction.

THE STATUTE INVOLVED.*

This controversy involves the application of Section 207(a) of the Fair Labor Standards Act (29 U.S.C.A. hereinafter referred to as the Act), in two respects. Section 207(a) of the Act provides:

> "Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> "(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,
>
> "(2) for a workweek longer than forty-two hours during the second year from such date, or
>
> "(3) for a workweek longer than forty hours after the expiration of the second year from such date,
>
> unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

THE QUESTIONS PRESENTED.

Our two questions are, first, "Are the two employees in question covered by the Act at all?" Only if the Court's decision of this question be answered in the

* All portoins of statutes referred to herein are set forth in full in Appendix A hereto.

affirmative does the second question arise, which is "Over what hours does this coverage extend?" As stated, a negative answer to the first question makes the second question unimportant, if not moot, save for the conflict in the decisions of this point by the Circuit Courts below.

The decision of each of these questions involves the interpretation of the same section of the same statute, —Section 207(a) of the Fair Labor Standards Act quoted above. In each case, interpretation of that statute involves a consideration of statutory definitions and of judicial definitions of words found in the statute.

We shall divide this argument into two sections. In the first we shall consider the basic question of whether the employees here involved are covered by the Act at all. We shall substitute in the Act the statutory and judicial definitions of those words insofar as they are relevant to the question at hand. Then we shall apply the law, so considered to the stipulated or undisputed facts disclosed by the record.

In the second part we shall treat the same section of the Act in the same way. We shall supplant certain exact words of the Act with the statutory and judicial definitions of those words, applying the Act, so interpreted to the facts disclosed of record.

But relevant to both parts of this argument, there are certain principles established by this Court, governing the nature of this statute and the rules to be used in interpreting it. We shall first advert to those judicial statements as to the nature of the Act and the rules to be applied in interpreting it.

Rules of Construction of This Statute Established by This Court Require Strict Construction of the Ordinary Words of This Act.

As in the case of all Congressional enactments there arises at the outset the question of the nature of the statute involved, and the degree of strictness to be applied in the interpretation of the new statute. As to this Act this question arose in this Court in the leading case of *Kirschbaum* v. *Walling*, 316 U.S. 517. At page 522 of that decision this Court pointed out that this Act was a clear invasion by Congress of a field heretofore left to the States. As to such statutes this Court said:

> "The history of Congressional legislation regulating not only interstate commerce as such but also activities intertwined with it, justified the generalization that, *when the federal government takes over* such local radiations in the vast network of our national economic enterprise and thereby *radically readjusts the balance of state and national authority*, those charged with the duty of legislating are *reasonably explicit* and *do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.*"

This rule was again adverted to by this Court in *Addison* v. *Holly Hill Fruit Products*, ... U.S. .....; 88 L. Ed. (Adv. Op.), 1123 at 1129, in the following language:

> "The details with which the exemptions in this Act have been made *preclude their enlargement by implication*. While the judicial function in construing legislation is not a mechanical process from which judgment is excluded, it is nevertheless very different from the legislative function. Construction is not legislation and must avoid 'that retro-

spective expansion of meaning which properly deserves the stigma of judicial legislation.' ". (Citing *Kirschbaum* v. *Walling, supra.*)

This language was buttressed upon the Court's preceding reasoning applied to this Act, as follows:

> "We should of course be faithful to the meaning of a statute. But after all Congress expresses its meaning by words. If legislative policy is couched in vague language, easily susceptible of one meaning as well as another in the common speech of men, we should not stifle a policy by a pedantic or grudging process of construction. To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit *outside the bounds of the normal meaning of words is quite another*: For we are here not dealing with the broad terms of the Constitution 'as a continuing instrument of government' but with *part of a legislative code* 'subject to continuous revision with the changing course of events.' *United States* v. *Classic*, 313 U.S. 299, 316; 85 L. ed. 1368, 1378, 61 S. Ct. 1031."

When we consider the above language with another principle previously applied to the construction of this same Act, the language acquires a new meaning. The principle referred to was reiterated in the recent decision of this Court in *McLeod* v. *Threlkeld*, 319 U.S. 491 at 493 in this language:

> "In the Fair Labor Standards Act, Congress *did not intend* that the regulation of hours and wages should extend to the *furthest reaches of federal authority*. The proposal to have the bill apply to employees 'engaged in commerce in any industry affecting commerce' was rejected in favor of the language, now in the act, 'each of his employees who is engaged in commerce or in the production of goods for commerce.' Sections 6 and 7. See the

discussion and reference to legislative history in *Kirschbaum* v. *Walling*, 316 U.S. 517, and *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564. The selection *of the smaller group was deliberate and purposeful.*"

Coupled together, we find that the Congress used two methods of exemption in enacting this legislation. Starting with all employees of an employer engaged in interstate commerce, it exempted first by "deliberate and purposeful" non-inclusion. Then, within the "smaller group" so selected for coverage, the Congress made "not less than eleven exempted classes."*

We respectfully submit that the exemptions arising from "deliberate and purposeful" non-coverage under the Act, are as much subject to this Court's holding that "Exemptions made in such detail preclude their enlargement by implications", as exemptions made by subsequent exclusion from the "smaller group" selected for primary coverage.

From these recent decisions we glean the following rule for the construction of this Act.

1. Since the Act requires a realignment of National and State rights we must assume that Congress was explicit in defining the coverage of the Act. We must assume that the limitation of original coverage and the "selection of a smaller group" (than all the employees of an employer engaged in interstate commerce) was "deliberate and purposeful." And in such a statute the particularity with which the many added exemptions from that smaller group are described, prevents any expansion by implication, whether it be an expansion

* *Addison* v. *Holly Hill Fruit Products*, ... U.S. ....; 88 L. Ed. (Adv. Op.) 1123)

by implication, of the "smaller group" originally selected for coverage, or the expansion by implication of any of the exemptions so specifically made from that group."

Section 1. Employes of the type here involved are not covered by the act.

THE ACT REQUIRES SOME OCCUPATION WHICH IS ESSENTIAL TO PRODUCTION, AS A CONDITION PRECEDENT TO COVERAGE.

The relevant portion of Section 207(a) of the Act (quoted in full in Appendix A hereto), with emphasis upon certain words of the Act which are either defined in the statute itself, or which have been judicially defined by this Court, reads as follows:

> "Sec. 7. (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in *commerce* or in the *production of goods* for *commerce* * * *. etc.

On the question of coverage this is all of the Act that need be considered. The understored words are defined by Sections 203(b), 203(i) and 203(j) of the Act, respectively. Substituting these Congressional definitions, and the above statute reads:

"No employer shall, except as otherwise provided in this Section, employ any of his employees who is engaged in *trade, commerce, transportation, transmission or communication among the several states*[1] or in the *production, manufacturing, mining, handling, or in any other manner working on*[2] such *wares, products, commodities, merchandise or articles or subjects of commerce of any character or any part thereof*[3] for *trade, commerce, transportation, transmission or communica-*

[1] "commerce", (Sec. 203 (b)).
[2] "produced", (Sec. 203 (j)).
[3] "goods", (Sec. 203 (i)).

tion among the several states or from any state to a point outside thereof[1] and *for the purpose of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any state.*"[2]

As we shal. show in greater detail, there is here no claim or evidence that either of the employees here was engaged in commerce in any way. Nor is there any claim or any evidence that these two employees "manufactured, mined, handled, transported or worked on" (*i.e.* "produced"), any "wares, products, commodities, merchandise or articles or subjects of commerce of any character, or any part or ingredient thereof" (*i.e.* "goods"), of any kind or nature. Nor are these men engaged in any "process" of any kind.

The coverage of these employees, if supportable at all, must rest upon the last proviso of the definition of "produced", *viz.*, their engagement *"in any * * * occupation necessary to"* the manufacture, mining, etc. of goods, wares, etc., for commerce.

One word in this last quoted phrase has been repeatedly defined by this Court and the lower courts,—the adjective "necessary" which modifies the noun "occupation", in the clause last above quoted.

The recent decision of this Court in *McLeod* v. *Threlkeld*, 319 U.S. 491; 87 L. ed. 1538, affords obvious illustration of a principle repeatedly theretofore described

[1] "commerce". (Sec. 203 (b)).
[2] "production of goods". (Sec. 203 (j)).

in the abstract of this and other State and Federal Courts. We first quote several of those abstract definitions without comment.

"Without light and heat and power the tenants *could not* engage, as they do, in the production of goods for interstate commerce. The maintenance of a safe, habitable building is *indispensable* to that activity."

* * *

"We agree, however, with the conclusion of the courts below. In our judgment, the work of the employees in these cases had such a *close and immediate tie* with the process of production for commerce, and was therefore so much an *essential part* of it, that the employees are to be regarded as engaged in an occupation 'necessary to the production of goods for commerce.'" (*Kirschbaum* v. *Walling*, 316 U.S. 517 at 525-526, 86 L. ed. 1638 at 1649.)

"Oil is obtained only by piercing the earth's surface; drilling a well is a necessary part of the productive process to which it is *intimately* related. The connection between respondents' activities in partially drilling wells and the capture of oil is *quite substantial* and those activities certainly bear as *'close and immediate tie'* to production as did the services of the building maintenance workers held within the Act in *Kirschbaum Co.* v. *Walling*." (*Warren-Bradshaw Drilling Co.* v. *Hall, et al.*, 317 U.S. 88; 87 L. ed. 99 at 100.)

"We think that practical test should govern here. Vehicular roads and bridges are as *indispensable* to the interstate movement of persons and goods as railroad tracks and bridges are to interstate transportation by rail."

* * *

"* * * without their services *these instrumen-*

talities would not be open to the passage of goods and persons across state lines."

* * *

"The operational and maintenance activities of petitioners are *vital to the proper function* of these structures as instrumentalities of interstate commerce." (*Overstreet* v. *North Shore Corp.*, 318 U.S. 125; 87 L. ed. 423 at 425-426.)

In *Addison* v. *Holly Hill Fruit Products Co.*, ... U.S. ....., 88 L. ed. (Adv. Op.), 1123 at 1129, this Court described the principles applied in making these prior interpretations, as follows:

"We should of course be faithful to the meaning of a statute. But after all Congress expresses its meaning by *words*. If legislative policy is couched in vague language, easily susceptible of one meaning as well as another, in *the common speech of men*, we should not stifle a policy by a pedantic or grudging process of construction. To let general words draw nourishment from their purpose is one thing. *To draw on some unexpressed spirit outside the bounds of the normal meaning of words* is quite another. For we are here not dealing with the broad terms of the Constitution 'as a continuing instrument of government' but with part of a legislative code 'subject to continuous revision with the changing course of events.' *United States* v. *Classic*, 313 U.S. 299, 316; 85 L. ed. 1368, 1378, 61 S. Ct. 1031."

Obviously, this Court has accepted the word "necessary" in its "normal meaning" and has refused to "draw on some unexpressed spirit outside the normal meaning" of this word "necessity."

It remained for this Court to illustrate these previous abstract statements, in *McLeod* v. *Threlkeld*, 319 U.S. 491; 87 L. ed. 1538. There the involved employees

worked in a dining car which followed a railway maintenance crew along the right-of-way, serving meals for which the maintenance men paid the operators of the car. Relying upon *Overstreet* v. *North Shore Corp.*, 318 U.S. 125, (wherein this Court held the element of necessity to apply as well to engaging in commerce as to production of goods) employees of the car claimed coverage under the Act.

In denying this claim, this Court reiterated this abstract principle (319 U.S. at 497; 87 L. ed. at 1543):

> "The test under this present act, to determine whether an employee is engaged in commerce, is *not* whether the employee's activities *affect* or *indirectly relate to* interstate commerce but whether they are *actually in* or so *closely* related to the movement of the commerce *as to be a part of it.* Employee activities outside of this movement, so far as they are covered by wage-hour regulation are governed by the other phrase, 'production of goods for commerce.'
>
> "It is not important whether the employer, in this case the contractor, is engaged in interstate commerce. It is the work of the employee which is decisive."

Then follows a most enlightening illustration. This Court said:

> "Here the employee supplies the *personal* needs of the maintenance-of-way men. Food is consumed apart from their work. The furnishing of board seems to us as remote from commerce, in this instance, *as in the cases where the employees supply themselves. In one instance the food would be as necessary for the continuance of their labor as in the other.*" (*McLeod* v. *Threlkeld, et al.*, 319 U.S. 491 at 497; 87 L. ed. 1538 at 1544.)

Thus the Court distinguishes between convenient, useful, desirable or practical, on the one hand, and "necessary", "indispensable" and "essential" on the other. No doubt it was *convenient* for both the men and the employer that the cook-car employees followed the maintenance crews and supplied their meals on the spot. No doubt the service of the cook-car employees was *useful* and *desirable* to carrier and maintenance crews alike. But insofar as its relation to the maintenance work was concerned, the services of the cook-car were not "necessary," "indispensable" or "essential" as it is perfectly clear that the work could and would proceed as usual if the cook-car disappeared and the workmen brought their own lunches from home, rather than buy them from the cook-car. The Court conceded the necessity of the men eating, but denied that the cook-car afforded the sole means of supplying this necessary founction.

We shall now proceed to apply these settled principles of law to the undisputed (largely stipulated) facts of record.

These Employees Had No Primary Responsibility for Protecting the Plant from Fire.

In *Kirschbaum* v. *Walling*, 316 U.S. 517, this Court definitely established the principle that watchmen, charged with the responsibility of protecting a plant and the products therein, against loss from trespass or fire, were an essential part of production of goods for commerce, and therefore covered by the Act.

The employees involved here have *no such responsibility*. The plant is constantly patrolled by a full crew of watchmen such as were involved in the *Kirschbaum* case. These employees are not a part of that staff.

They do no patrolling. They have no responsibility for discovering fires in the plant. *They do not even have the primary responsibility of extinguishing it.* That responsibility is the watchman's. The service of these two employees at all times the watchmen are on duty is limited to answering calls of the watchmen, *if, as and when made.* Unless and until called by the watchmen, these employees are *not even permitted to be in the plant* at such times, and have no responsibility for the safety of the plant or of any goods maintained therein.

With this undisputed fact in mind, the question arises: Does the coverage of the Act extend beyond the employees primarily charged with the duty of protecting the plant from fire, to cover other employees having no such direct responsibility, who are called to the assistance of the watchman, approximately once each month?

THE SERVICE OF THESE EMPLOYES HAD ONLY THE MOST REMOTE BEARING ON PRODUCTION OF GOODS.

Factory workers need a machine for their production. The men who maintain that machine are engaged in work "necessary" to the production. But the employee engaged in placing the Company's name on the machine in gold letters, or painting it merely to harmonize with the color schemes in the plant, does nothing which improves or affects the productive capacity of the machine, or nothing which is "necessary" to the maintenance or operation of that machine.

The parallel is obvious. Even if we were to admit that some fire protection is "necessary" to the production of goods, (just as the Court conceded the necessity of the railroad crew eating) the City Fire Depart-

ment affords the customary usual and adequate protion. The installation of fire extinguishers and sprinkler systems constitute *added* protection, which the owner may or may not elect to furnish. But it would be going far afield to say that men engaged in installing sprinkler systems in a factory were performing a service "indispensable" to production, or having "such and immediate tie" and therefore "so much an essential part" of production as to be "a part of it." Obviously, production would proceed at the regular rate *whether sprinkler systems were installed or not.* The sprinkler system provides an *added* protection over and above any that is necessary, just as the cook-car provided an *added* but *unnecessary* method of providing a necessary service.

When in addition to a sprinkler system, an employer elects to install adjacent to the production building, a fire engine and to man it with a crew of men, again, neither the installation, nor the subsequent abandonment of this added protection in any way *increases, reduces or affects the production of the plant.* A strange, unusual and forced meaning must be given the word "necessary" in order to say that goods cannot be produced without the maintenance of a full time, privately paid fire department on the premises.

The record here affords factual refutation for any such assumption. It is undisputed that at *no* plant of *any* of the great soap making companies of the country, —Procter and Gamble, Lever Brothers, Colgate-Palm-olive-Peet, (23 plants in all) is any such *deluxe* fire protection maintained as is maintained at the Armour plant, yet great quantities of "goods" (soap) are "produced" for commerce at those plants. This undisputed *fact* controverts any *assumption* of "necessity" that

might otherwise be indulged in. The real subject involved has no bearing on production.

Basically, whether we speak of fire hazard, tornado or windstorm hazard, we are dealing, not with a question of production, but with a question of indemnity and insurance. Whether an employer carries any insurance of any kind against loss from such agencies whether he carries 10 per cent coverage, 50 per cent coverage, or full coverage, *is not a matter affecting the production of goods for commerce.* Nor can the terms and conditions upon which the employer purchases such insurance in any way affect the production. He may choose to pay a $5,000 annual premium and refuse to install a sprinkler system or private fire fighting staff. He may deem it good business to expend $50,000 for the most modern deluxe protective equipment with a resulting annual insurance premium of $1,000. Whichever he elects, *production of goods is in no way affected, increased or reduced.*

One other fact points the way here. The executive division of the Company charged with responsibility for the "production of goods for commerce," has not the slightest voice in deciding at what plants a private fire department shall be maintained and at what plants not maintained. The Company executives who decide this question are the executives charged with the responsibility of insuring the Company's property. They, in turn, have no voice whatever, in the production program.

The Company maintains two soap factories, the one here involved and another at North Bergen, New Jersey. At both plants "goods" are "produced" for "commerce" in great quantities. At North Bergen such pro-

duction is accomplished without the aid of a fire engine or paid operators such as these two employees. At the Chicago plant, the insurance executives have decided it to be a good investment to require such protection.

Upon what theory can such protection be said to be "necessary," "essential" or "indispensable" to the production of soap at Chicago, when similar production is successfully and regularly carried on at the Company's other plant, at the 14 plants of Procter and Gamble, at the 5 plants of Lever Brothers, and at the 4 plants of Colgate-Palmolive-Peet, without any such refinement?

An analysis of the evidence offered by the executives of these four companies gives a clue to the answer. Presumably all plants have the protection of the fire departments of the cities in which they are located. At some plants there is little added protection supplied. At others, instructions in the rudiments of fire fighting is given regular production employees. At others fire fighting equipment is maintained, manned in an emergency by volunteer fire fighters. At most of the plants no employee devotes full time to the phase of fire fighting. Some hire a part time employee for that purpose. A few hire one full time employee. None have gone so far in the field as has Armour at Chicago.

These facts reveal that the *extent to which a Company may go in protecting its capital investment against loss by fire is a matter of pure management discretion, entirely unrelated to production.* Management is free to rely solely upon the protection of the City Fire Department. It is free to provide an added deluxe protection as Armour has done here. It is free to buy no insurance at all. It is free to buy one hundred

percent coverage. Neither the degree of insurance coverage nor the degree of added fire protection provided has the slightest effect upon the production of goods for commerce. The primary objective is the *insurance of invested capital,* not the insurance of continued production of goods.

Insofar as an employee is engaged in supplying added fire protection he is primarily engaged in providing protection against capital loss.

Congress has gone no further than to include employees engaged in production of goods, or in occupations necessary to production. It has specifically defined production. It has not covered employees engaged in selling goods. It has not by this statute, covered employees engaged in supervising production of goods, nor employees engaged in the interstate trucking or shipment of goods. Nor has it covered employees whose sole function is to avoid interference with the production of goods. In view of the great particularity of description found in this Act, in view of "deliberate and purposeful" selection of the "smaller group" (*viz.*, those engaged in commerce or in production of goods for commerce), we should assume that had Congress intended to cover by the Act, employees engaged primarily for the protection of capital investment, it would have said so.

Section II. Persons free to play cards, games, listen to radio, or sleep on the premises, as and when they choose, are not then "employed" within the meaning of the Act.

As stated before, this question arises only if the Court first finds that soap cannot be produced for commerce unless the protection of the City Fire Depart-

ment be supplemented by the addition of private fire fighters by the producing company.

Following the pattern of Section I we shall first set forth the relevant language of the statute involved. Then we shall substitute the statutory and judicial definitions of the words found in that language, and apply the Act, to the stipulated facts of record.

THE STATUTE REQUIRES THE PERFORMANCE OF REAL PHYSICAL OR MENTAL EXERTION AS EMPLOYMENT."

The relevant portion of Section 207(a) of the Fair Labor Standards Act provides (defined terms being again emphasized):

> "207(a). No employer shall, except as otherwise provided in this section *employ* any of his employees who is engaged in commerce or in the production of goods for commerce,—
>
> "(1) for a workweek longer than forty-four hours", etc.
>
> * * *
>
> "unless such employee receives compensation for his *employment* in excess of the hours above specified at a rate not less than one and one-half times * * *." etc.

Substituting the Congressional definition of "employ" found in Section 203(g) of the Act, and the above statute reads:

> "No employer shall * * * *suffer or permit* his employees *to work*, who are engaged * * *" etc.
>
> * * *
>
> "unless such employee receives compensation for *being suffered or permitted to work*, in excess of the hours * * *" etc.

At first blush it would seem that the following pronouncement of this Court in *Addison* v. *Holly Hill Fruit Products*, ... U.S. .....; 88 L. ed. (Adv. Op.), 1123 at 1129, would dispose of any question as to the meaning of this language:

> "For the ultimate question is what has Congress commanded, when it has given no clue to its intentions except *familiar English words* and no hint by the draftsmen of the words that they meant to use them in *any but an ordinary sense*."
>
> * * *
>
> "After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to *rely on ordinary words* addressed to him."

But we need not rely upon theory, for this Court has defined the word "work" as used in this very statute. In *Tennessee Coal, Iron & R. R. Co.* v. *Muscoda Local No. 123*, ... U.S. .....; 88 L. ed. (Adv. Op.) 610 at 614 this Court said:

> "In determining whether this underground travel constitutes compensable work or employment within the meaning of the Fair Labor Standards Act, we are not guided by any precise statutory definition of work or employment. Section 7(a) merely provides that no one, who is engaged in commerce or in the production of goods for commerce, shall be employed for a workweek longer than the prescribed hours unless compensation is paid for the excess hours at a rate not less than one and one-half times the regular rate. Section 3(g) defines the word 'employ' to include 'to suffer or permit to work,' while Section 3(j) states that 'production' includes 'any process or occupation necessary to * * * production.'"

"Accordingly we view Sections 7(a), 3(g) and 3(j) of the Act as necessarily indicative of a Congressional intention to guarantee either regular or overtime compensation for all *actual work* or employment."

* * *

"* * * we cannot assume that Congress here was referring to *work* or employment *other than as those words are commonly used*—as meaning *physical or mental exertion* (whether burdensome or not) *controlled or required* by the employer and pursued necessarily and primarily for the benefit of the employer and his business."

Substitution of both the statutory and judicial definitions produces a statute reading as follows:

"No employer shall * * * suffer or permit his employees to perform physical or mental exertion (whether burdensome or not) controlled or required by the employer, who are engaged in commerce * * * unless such employee receives compensation for such physical or mental exertion in excess of the hours * * * etc.—

Thus defined the statute presents this question.

When an employee is free to sleep, eat, play the radio, play cards, read, write letters, or *occupy himself as he pleases*, is he being "suffered or permitted to perform physical or mental exertion required or controlled by his employer?"

A brief review of the unchallenged facts hereinbefore set forth under "Statement of the Case" (pp. ..... *post*) and the application of the law to those facts should conclusively establish that when these men are in the fire hall free to do exactly as they please, they are not "working" or not "employed" as the statute and this Court have defined those words.

THE INTERPRETATIONS OF THE ADMINISTRATOR OF THE ACT ARE CONSISTENT WITH THE EMPLOYER'S POSITION HERE.

In most cases involving an administrative statute, the Courts welcome the interpretation placed upon a disputed statute by the administrator of that Statute. Such ruling, while not controlling, is usually accorded great weight by the Courts. (See *United States* v. *Johnston*, 124 U.S. 236; *Swift & Co.* v. *United States*, 105 U.S. 691; *Five Per Cent Cases*, 110 U.S. 471; *U. S.* v. *Philbrick*, 120 U.S. 52; *Dismuke* v. *U. S.*, 297 U.S. 167; *Brewster* v. *Gage*, 280 U.S. 327; *U. S.* v. *C.N.S. & M.R. Co.*, 288 U.S. 1; *U. S.* v. *American Trucking Assn.*, 310 U.S. 534; *Sanford* v. *Commissioner of Internal Revenue*, 308 U.S. 39; *Kessler* v. *Strecker*, 307 U.S. 22. This Court gave consideration to such an interpretation in the *Tennessee Coal & Iron case*, 88 L. ed. 610 at 616 (Adv. Op.).

Before both the District and Circuit Courts below, we set forth in full relevant paragraphs of Interpretative Bulletin No. 13 issued by the administrator of this Act. Neither Court criticized that interpretation. Neither Court held it in error. *Neither Court mentioned it.* These paragraphs of Interpretative Bulletin No. 13, read as follows:

> "6. In a few occupations *periods of inactivity* need not be considered as hours worked even though the employee is subject to call. The answer will generally depend upon *the degree to which the employee is free to engage in personal activities during periods of idleness* when he is subject to call and the number of consecutive hours that the employee is subject to call without being required to perform *active work—i.e.*, the frequency with which the employee is called upon to *engage in*

work. In these cases, the nature of the employee's work involves *long periods of inactivity* which the employee may use for *uninterrupted sleep,* to conduct *personal business affairs,* to carry on a *normal routine of living,* etc. A good example of this is the employee of a small telephone exchange operating a switchboard located in the employee's house. During the night no one is in direct attendance at the switchboard and an alarm bell awakens the operator if a subscriber wishes to make a telephone call. The operator has her bed alongside the switchboard and is able to get several hours of uninterrupted sleep every night, as experience over a considerable period of time may often demonstrate. Thus, if over a period of several months a telephone operator has been called upon to answer only a few calls between the hours of 12 and 5 in the morning a *segregation of such hours from hours worked* will probably be justified.

"7. In some cases employees are engaged in active work for part of the day but because of the nature of the job are also required to be *on call* for 24 hours a day. Thus, for example, a pumper of a stripper well often resides on the premises of his employer. The pumper engages in oiling the pump each day and doing any other necessary work around the well. In the event that the pump stops (at any time during the day or night) the pumper must start it up again. Similarly; *caretakers, custodians, or watchmen* of lumber camps during the off season when the camp is closed, *live on the premises* of the employer, have a regular routine of duty but are subject to call at any time in the event of an emergency. The *fact that the employee makes his home at his employer's place of business in these cases does not mean that the employee is necessarily working 24 hours a day.* In the ordinary course of events the employee has a normal night's sleep, has ample time in which to eat his

meals, and has a certain amount of time for *relaxation and entirely private pursuits.* In *some* cases the employee *may* be free to come and go during certain periods. Thus, here again the facts may justify the conclusion that the employee is *not working at all times during which he is subject to call in the event of an emergency,* and a reasonable computation of working hours in this situation will be accepted by the Division."

THE DOCTRINE OF DE MINIMUS.

The administrator's reference to the "degree to which the employee is free to engage in personal activities during periods of idleness" suggests a consideration of how many hours these employees' personal pursuits were interrupted by the calls of the watchmen for help in fighting fires or repairing fire fighting apparatus.

These calls are classified and computed on pages 26-29 of the Transcript of Record. Suffice it to say here that during the 131 weeks worked by employee Wantock, he averaged *one* such emergency call every 3.36 weeks of service. Each interruption averaged 47 minutes in duration. Employee Smith averaged *one* such call every four weeks. Each interruption averaged 58 minutes.

Roughly, the personal pleasures and activities of these men was interrupted less than *one* hour *once each month.* We think this is an apt case for the doctrine of *de minimus.*

Demonstrable Errors of the Courts Below.

We think the error of the District Court is illustrated by the following colloquy, appearing at pages 20, 21 of the Transcript:

"It is my opinion that the maintenance of such a fire department as we have here in Chicago, as described by this record, is not necessary to the production of goods in a soap plant.

"The Court: I do not think it is material. I do do not think it has any bearing on the issues. It will be admitted subject to the objection. My opinion is they do maintain it **whether it is necessary or not,** and the persons employed there are engaged in interstate commerce.

"Mr. Blanchard: That raises a point of law which is the crux of the case."

Waiving the *lapsus lingue* (engaged in commerce when production of goods in commerce was probably meant) the District Court's holding that the necessity or essentiality of the services of these men for the production of goods was *absolutely immaterial,* is of course is at total variance with the repeated holdings of this Court. (*Overstreet* v. *North Shore Corp.,* 318 U.S. 125; *Kirschbaum* v. *Walling,* 316 U.S. 517; *Warren-Bradshaw Drilling Co.* v. *Hall,* 317 U.S. 88; *McLeod* v. *Threlkeld,* 319 U.S. 492.)

The Circuit Court's error is, we believe, demonstrated by the following sentence near the conclusion of the opinion of the two judges constituting the majority:

"The *only legal* question, as we see it, is therefore, directed to the ascertainment of the *legal status of the plaintiffs* to the defendant during those periods when they were subject to call as auxiliary firemen. Notwithstanding the latitude they had in their activities, we are convinced that *their legal status was that of employee* during that time."

We respectfully submit that the mere status of a person as an "employee" is not sufficient to bring such person under the coverage of the Fair Labor Standards Act.

CONCLUSION.

This Court has held that watchmen, when occupied with the protection of plants and goods involved in interstate commerce, are sufficiently necessary to the production of goods for commerce, to be covered by the Act. We believe this holding establishes the outer perimeter of the coverage of the Fair Labor Standards Act. We do not believe the employees here, who have no primary responsibility for the discovery of fires in the plant, or no responsibility even for extinguishing such fires, save when a watchman having original responsibility calls them to his assistance, can be said to be indispensable or essential to the production of goods. Particularly does this seem sound when it appears that these employes are called upon to render aid approximately one time for an average of one hour, each calendar month.

But if this Court feels that Congress intended to throw the protecting coverage of the Act over persons so remote from any productive necessity, we submit that Congress has extended that coverage only over those hours when an employee worked, in the normal and usual sense of the word. We think that any application of "work" to time spent as the employee wishes; time spent at sleep, at amusements, at literary or edu-

cational pursuits, as the employee wills, extends the coverage of the Act far beyond any coverage intended by Congress.

Dated at Chicago, Illinois, September 20, 1944.

Respectfully submitted,

ARMOUR AND COMPANY,
Defendant-Appellant.

By CHAS. J. FAULKNER, JR.,
FREDERICK R. BAIRD,
R. F. FEAGANS,
PAUL E. BLANCHARD,
Attorneys for Petitioner.

4301 South Racine Avenue,
Chicago 9, Illinois.

Dated at Chicago, Illinois,
September 20, 1944.

APPENDIX A.

Relevant Sections of the Fair Labor Standards Act. Title 29, U. S. C. A.

Sec. 203. DEFINITIONS

As used in sections 201-219 of this title—

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several states, or from any state to any place outside thereof.

* * *

(g) "Employ" includes to suffer or permit to work.

* * *

(i) "Goods" means goods (including ships and marine equipment) wares, products, commodities, merchandise, or articles or subjects of commerce of any character or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or *occupation necessary to the production thereof*, in any State.

Sec. 207. MAXIMUM HOURS.

(a) No employer shall, except as otherwise provided in this section, *employ* any of his employees who

is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his *employment* in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is *employed*.